STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Saad, P.J., and Sawyer and Fort Hood, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY WESTCARR,

Defendant-Appellant.
_____/

Supreme Court No. 126477

Court of Appeals No. 243042

Lower Court No. 01-010393

WAYNE COUNTY PROSECUTING ATTORNEY
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126477

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTION PRESENTED

1. Did the trial court abuse its discretion in granting the prosecution's trial day motion to indorse an additional examining doctor as a witness and in refusing to allow defendant-appellant a continuance in order to prepare to cross-examine him?

The trial court said "No."

The Court of Appeals said "No."

Defendant-Appellant says "Yes."

2. Did defendant-appellant receive ineffective assistance of counsel when his trial attorney failed to object to testimony of his alleged physical abuse of Mulvina Westcarr?

The trial court did not answer this question.

The Court of Appeals said "No."

Defendant-Appellant says "Yes."

3. Was defendant-appellant denied a fair trial by the admission that the witness, over objection that the witness was present during the trial, of improper rebuttal testimony concerning a collateral matter that was not responsive to evidence introduced in his case-in-chief but was in response to denials elicited during his cross-examination, and trial counsel was ineffective when he failed to object to this testimony on this basis?

The trial court said "No."

The Court of Appeals said "No."

Defendant-Appellant says "Yes."

4. Must defendant-appellant be resentenced because the trial court incorrectly scored OV 13, and the resulting 15 to 30-year sentences were imposed above the statutory sentencing guidelines without any substantial and compelling reasons to do so?

The trial court said "No."

The Court of Appeals said "No."

Defendant-Appellant says "Yes."

STATEMENT OF JURISDICTION AND RELIEF REQUESTED

Defendant-Appellant Anthony Westcarr was convicted by a Wayne County Circuit Court jury, the Hon. Ulysses W. Boykin presiding, of three counts of first degree criminal sexual conduct with a person under 13 years old, MCL 750.520b(1)(a) and was sentenced on May 15, 2002. He appealed as of right to the Court of Appeals, and a brief on appeal was filed on or about June 3, 2003. On May 20, 2004, the Court of Appeals issued an unpublished, per curiam opinion affirming his convictions and sentences (49a-c).

The Court of Appeals' decision is clearly erroneous and will cause material injustice, and its decision conflicts with other decisions by this Court and the Court of Appeals. MCR 7.302(B)(5). The trial court abused its discretion when it granted the prosecution's trial day motion to indorse an additional examining doctor as a witness and in refusing to allow defendant-appellant a continuance in order to prepare to cross-examine him. The Court of Appeals opinion upholding this ruling violated clearly-established precedent regarding continuances when late witnesses are allowed. See *People v Charles O. Charles O. Williams,* 386 Mich 565 (1972) and its progeny.

Defendant-Appellant also received ineffective assistance of counsel when his trial attorney did not object to testimony of his alleged physical abuse of the complainant's mother and when his trial attorney did not object to rebuttal testimony on the basis that it was on a collateral matter. The scoring of the sentencing guidelines was against the language of the guidelines instructions.

Defendant asks this Court to grant this application for leave to appeal or order other appropriate relief, such as peremptory reversal of his convictions and sentences.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Defendant-Appellant Anthony Westcarr (defendant) was originally charged with four counts of first degree criminal sexual conduct with a person under 13 years old, MCL 750.520b(1)(a) for incidents with stepdaughter Daejanae Norman (Daejanae) alleged to have occurred between January, 2000 and August 13, 2001 (*Felony Information,* lower court file). One of the fellatio counts was dismissed via a directed verdict after Daejanae testified about only one incident of fellatio (4-30-02 45).

Trial Day Motion to Endorse Witness and Denial of Continuance

Jury selection began on April 25, 2002 and progressed through the morning without concluding (4-25-02 3-142). After the lunch break, the prosecution announced that the Daejanae's mother had produced a page from her medical report that neither attorney had seen,[1] and proposed impaneling the jury anyway (4-15-02 143, 145). After a brief recess, the defense asked for an independent examination and an adjournment, but the trial court suggested the following:

> In looking at this situation right now, the way it appears that if the People move to endorse the second doctor[2], who did the last of the examinations from the pediatric clinic.
>
> And if the Court grants that motion, then what will happen is the evidence that will come in, in both these reports, the substance of the reports, the testimony of both doctors coming in. We have an issue of fact created for the jury.
>
> With respect to an independent examination, I don't know or it is not my thinking that that would really be beneficial at this time to have the minor plaintiff undergo a third examination because either the jury could pick which report they wanted.

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[1] Mulvina Westcarr later testified that she had kept a copy of Daejanae's medical records because "[e]verybody has to prepare cause (sic) I know that he did it." (4-29-02 187).

[2] The physician was not named during this discussion, but based on later testimony, it was Leland Babitch, M.D.

One would be stronger for the people and one would be stronger for the defense is I don't think that the terms or at least the posture of the evidence going into trial would be served by a third examination.

So what I would propose to do is go ahead and finish the jury selection, we're not going to get to any evidence or even opening statements, I don't think today, unless we get a jury real quick (4-25-02 148).

The trial court emphasized that it was "loathe" to discharge the jury and start over "on this basis." (4-25-03 149). The defense objected:

MR. DUBOSE: Your Honor, the problem I have is this. I have prepared for this trial and I spent a great deal of time in preparation for this trial, because I had one right before it.

I'm under the impression that we were going into this trial with the information that the hymen was, in fact, intact, because that's obviously beneficial to our position.

THE COURT: Certainly.

MR. DUBOSE: I now through this element of surprise, that is no fault of the prosecution, he was not aware of it, nor was I aware of it.

Now we have this new information with a new doctor, and his name is something totally different.

I have the right, or I would hope that I would have the right to call witnesses on my client's behalf to try to review or challenge any evidence that comes in that is detrimental to my particular client.

And this evidence in terms of whether the hymen is intact or not, it's so crucial to a case that involves penetration. I mean that's very germane to it.

And I feel that I should have the right to make the decision in terms of whether I want an expert to confirm what the findings are number one.

Or to maybe even challenge whatever findings their doctor is saying in regards to whether there was some type of sexual abuse going on.

Because I'm assuming that he's going to say that this hymen is not intact, that that's evidence of the particular sexual abuse and I should have the right to have an expert to challenge that. And I cannot do that at this late date and time, you know, find my own (4-25-02 150).

Defense counsel acknowledged that his witness list contained a "medical expert to be named," and that he had retained someone, but he had determined that it would not be necessary for him to call an expert because of the prosecution's representations that the hymen was intact and that the physician's report was inconclusive as to whether

there had been sexual abuse (4-25-02 151-154). He objected to the late endorsement of the second physician and asked for an adjournment:

> Your Honor, I would object then to the endorsement of this particular witness. I would ask that this witness not be endorsed, and if we are going to proceed to trial we go with the first witness that we have. And if the Court is going to endorse this new doctor, then I would ask that this matter be adjourned to allow me either have an independent expert, and independent evaluation of this child, or at least have the time to re-prepare for trial and have another expert for my side (4-25-02 154-155).

The trial court allowed the late endorsement and denied the request for an adjournment:

> It's other evidence out there, I can't ignore it. And you had been planning for an expert, or you hadn't designated one.
>
> So you know, if you have been planning for one, you may have some time, I don't know, what you can do between now and when you have to put on your proofs. But if you think you need one, you need to get one (4-25-02 155).

Trial Testimony

Daejanae testified that when she was six years old, she lived with "Teddy," whom she knew as defendant, her mom and two sisters "Kay-Kay" and "LeLe." (4-29-02 25, 50). When she was five or six[3], defendant "put his private in mine" in the evening in the "very, very back room" downstairs by laying her on the bed, laying over her, "scoot[ing]" her shorts to the side, and putting his "private" in hers and "mov[ing] around." (4-29-02 26-30, 30, 69). When asked what she meant by "private," Daejanae pointed to her groin and told jurors defendant used his "private" to go to the bathroom (4-29-02 30). Daejanae did not actually see defendant's "private" because she was looking around (4-29-02 67). It hurt a little, did not feel right and she did not like it (4-29-02 68). She could not remember if defendant did anything else with his "private." (4-29-02 28). Defendant then he got up and left (4-29-02 32). She was not sure if she went upstairs and played

[3] Daejanae could not remember what time of the year this incident happened (4-29-02 59).

with her sisters (4-29-02 69). She thought her mom was at home (4-29-02 33, 59, 70). She did not tell her mom because she was scared of defendant for some unknown reason (4-29-02 32-34, 65).

At a later time, Daejanae went to her grandfather's house in Florida with her sisters and mom, where defendant put his "private" in her mouth while they were in the kitchen (4-29-02 34, 35-38, 80). After defendant was done, he gave her some pop and he went to sleep (4-29-02 39).

Back in Detroit in August, defendant told her to lay down in the hallway, "put his private in my privacy" after "scooting" her shorts to the side, "moved around" and then put it in her mouth after she had gone into the house to change her clothes after swimming in the swimming pool (4-29-02 39-40, 81-83). Nothing came out of defendant's "private." (4-29-02 41). After this incident, defendant told her not to tell (4-29-02 40).

Daejanae's "private" was "tored. It was like little cuts" and her throat was so sore that she could not eat (4-29-02 41-42). She told her mom how her "private" had become sore during a bath when she asked "who did it to me." (4-29-02 41, 43, 84). Her mom initially thought Daejanae was talking about her "real dad." (4-29-02 47, 48, 85-86, 96). Daejanae's mom said that it was going to be all right, because she had seen it before and "she knowed what it looked like" because she had been bothered before." (4-29-02 43, 85). Daejanae was not taken to the hospital, but instead went to bed (4-29-02 86). Her mom waited until defendant went to work to take Daejanae to the hospital (4-29-02 86, 87).

During cross-examination, Daejanae testified that she remembered a day when defendant taught her how to ride a bicycle (4-29-02 53). She also remembered that her mom had gone to the dentist, that defendant's father picked up her mom and brought her home "the third time." (4-29-02 54). She remembered running into a van with her bicycle (4-29-02 55). She also remembered that she was outside all day and went in before her mom came back when she put her bicycle on the steps (4-29-02 55-56). She and her sisters went to her room, played with her teddy bear, had a tea party and watched television (4-29-02 57). This was a different day than "the third time." (4-29-02 81). Daejanae admitted that it was hard for her to remember what happened because it was a long time ago (4-29-02 63-64). She told jurors that her mom asked her questions "back and forth like this" and pretended that she was a lawyer, and when Daejanae got things "out of order," her mom told her to "check again."[4] (4-29-02 70-73, 93-94, 98). "LeLe" had a "little problem" like Daejanae did, went to the doctor and had to stay in bed[5] (4-29-02 74).

Mulvina Westcarr (Mulvina) was married to defendant, had four children, three of them with defendant, and lived with defendant at his home in Detroit (4-29-02 105-106, 111). Daejanae's father was Godfrey Norman (Godfrey), and she visited him "when it was convenient." (4-29-02 106, 109). Defendant would sometimes play with Daejanae and other times "seemed a little mean to her" because he was not her biological father (4-29-02 110, 137-139). Periodically, the children were alone with defendant if she had to go somewhere (4-29-02 108-109, 123, 148).

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[4] Mulvina denied that she prepared Daejanae for trial this way (4-29-02 188-189).

[5] Mulvina later testified that there was a dirty swimming pool in the back yard but denied that the children developed a rash as a result of swimming in dirty water (4-29-02 140). She took "LeLe" to the doctor because she had a rash and excoriation or redness "all over her body," but claimed she had not been exposed to stagnant water (4-29-02 185).

Mulvina went to Florida with her children in September, 2000 "because [defendant] was abusive"[6] and that her mother drove "because Mr. Westcarr was beating me and he called her and asked her to come get me out of the house." (4-29-02 109, 110, 139, 148). The family went back to Detroit when defendant called at some point and apologized (4-29-02 110, 139).

On August 22, 2001, Mulvina gave Daejanae a bath after she complained that her "coocoo cat" was itching and burning (4-29-02 111-112). Mulvina was shocked after looking at Daejanae's private area, because "the front of her coocat, it was stripped and she had what you call boils on it." (4-29-02 113, 140). She asked Daejanae what was wrong and if anyone had touched or "bothered" her[7] (4-29-02 113-114). Daejanae said "yes, my dad," and she assumed that meant Godfrey because he was the last person that Daejanae had been with, but learned it was "Teddy." (4-29-02 114). Mulvina became hysterical when she learned that defendant took out his "private" and asked Daejanae to "suck" it while she was the dentist's in August, 2001[8] (4-29-02 114, 115, 116, 117, 145-146, 147). Mulvina learned that this "hallway incident" had not been the first time, and that Daejanae had been "bothered" both in Florida,[9] and when she was around four years old (4-29-02 116). Daejanae did not go into much detail about the back bedroom incident, except to say that defendant "violated" her, and only learned the details when the police talked to her about it (4-29-02 145-146, 147).

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[6] She later claimed she left for Florida because defendant had affairs (4-29-02 122).

[7] Before this, Daejanae had not complained about anyone "messing" with her, because Mulvina usually asked (4-29-02 124, 143-145).

[8] According to Mulvina, defendant worked on the van on "the first time she visited the dentist, "but not in August, 2001 (4-29-02 116).

[9] Mulvina claimed that she did not notice any rashes, discharge, excoriation or skin peeling that suggested any problems when she gave Daejanae baths in Florida (4-29-02 143).

Mulvina "ran" out of the bathroom and confronted defendant, who denied the allegations (4-29-02 116, 118, 119, 147, 182). Mulvina tried to leave the home that evening, but defendant picked up "the baby" and tried to leave (4-29-02 119, 149, 179, 183; 4-30-02 37, 42). She begged "Rowan" to stay with the family "just so Mr. Westcarr won't hurt us." (4-29-02 119-120, 181; 4-30-02 34). Mulvina testified she and her children ended up spending the night in an upstairs bedroom, claiming that she could not call police or anyone else because defendant slept with the only cellular telephone they had[10] (4-29-02 120, 149-150, 180).

After defendant left for work the next morning, Mulvina "grabbed" the children and called Godfrey and her mother from a pay telephone to make arrangements to pick them up, drop the children at her mother's house and take her to the hospital (4-29-02 120; 4-30-02 36, 38). She did not call police, because defendant had said that Daejanae was lying and trying to break up their marriage and to "take her to a doctor." (4-29-02 120, 182; 4-30-02 36). Godfrey picked them up, dropped everyone except Daejanae at Mulvina's mother's house and took Mulvina and Daejanae to the hospital (4-29-02 120-121). The police later showed up at the emergency room (4-29-02 121, 181). Daejanae saw doctors for a follow-up visit two weeks later (4-29-02 126).

Before "the bath" Mulvina and defendant "weren't having any problem with each other," their relationship was "okay" because they did not see much of each other when he was home, and Mulvina loved defendant dearly:

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[10] Mulvina denied calling police and claimed that defendant had confiscated a second cellular telephone that he let her use, but she was impeached with a cellular telephone bill showing that she had called police twice and her mother once at times after she claimed she confronted defendant about Daejanae's allegations (4-30-02 38-40).

> I was carrying his son, his only son so far. He was abusive and I like a change. When I was pregnant, he started beating me. The relationship was different. He was abusive towards me. His parents was (sic) calling there multiple times (4-29-02 122).

Daejanae's allegations betrayed her and she felt as if she had been stabbed in the heart (4-29-02 122).

Mulvina had been sexually abused "in a way" when she was about eight years old, when she was "raped" by her cousin's husband, and no one knew about the incident except defendant (4-29-02 125). She denied having told Daejanae about it, except to say that "I have been in your shoes." (4-29-02 125-126). She denied telling Daejanae what to say and told jurors that she has never asked Daejanae to lie for her (4-29-02 127-129). Daejanae has had counseling and has had a hard time dealing with the boys in her class (4-29-02 128-129).

After defendant was incarcerated, he changed all the locks on the doors, so Mulvina was unable to get her belongings, but defendant contacted her and asked her to get her things, because "you need clothes for your funeral." (4-29-02 130). During her cross-examination, this occurred:

> Q Mr. Westcarr was in jail at that time, is that correct?
> A Yes, he was.
> Q And didn't you get a PPO even though you knew he was in jail?
> A I was going to get a PPO on him.
> Q Ma'am –
> A I know that he abused me and how he was.
> Q And when he abused each time that you're telling us he abuse you, you went down and got PPO's on him those times, haven't you?
> A He told me he would kill me.
> Q He told you he would kill you?
> A Yes, he did (4-29-02 134-135).

Defense counsel also elicited that Mulvina "tried to leave and he tried to choke me, told me if I leave he was going to kill me." (4-29-02 148). She claimed defendant did not

provide for her and that she and her children were better off without him (4-29-02 136-137). In her opinion, defendant "should pay for what he did." (4-29-02 188).

Daejanae was brought to the emergency room of Children's Hospital of Michigan by her mother with complaints of a sore throat[11] and a genital rash on August 23, 2001, and said she had a history of sexual abuse, with the latest incident occurring on August 13, 2001[12] (4-30-02 7-8, 9, 14-15). Sudershan Grover, M.D found the hymen to be intact, but only did a "visible inspection." (4-30-02 14, 18). He saw a yellow discharge, bruises, and excoriation hyper-pigmenting the skin[13] on the external genitalia, which could have been caused by some kind of scratching or trauma[14] (4-30-02 11-12, 13, 19). He opined that, given Daejanae's "history," it was possible that her symptoms were caused by sexual abuse, but stopped short of saying that her symptoms were definitely a sign of sexual abuse, saying that he could not be 100 percent certain that sexual abuse occurred (4-30-02 12, 20, 23). He admitted that it was possible that the discharge could have been caused by things other than sexual abuse, such as bubble baths or being exposed to chemically treated swimming pool water or stagnant or unclean water (4-30-02 21). He also admitted that it was possible that an infection would cause the child to scratch or rub the area and cause discomfort (4-30-02 19-20).

During a follow-up visit on August 27, 2001, Leland A. Babitch, M.D. did not specifically examine Daejanae for sexual abuse, but looked to see if there were any signs of new trauma or other problems (4-29-02 155, 157, 162, 163). He saw loss of coloration, loss of surface skin and lesions that had been worn off extending down her

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[11] Examination of the throat showed "some fine bacteria." (4-30-02 24).
[12] He testified that it was not unusual for children to delay reporting incidents of sexual abuse (4-30-02 15).
[13] Scratches or bruises and abrasions on the skin (4-30-02 11).
[14] He defined "trauma" as "somebody is forcefully scratching the area." (4-30-02 12).

leg, no tears, scars, crustations, papillas or clusterals, bruising or bleeding (4-29-02 157, 159, 166, 168, 169). He noticed no excoriation, except for an area that had a little scratching (4-29-02 161, 170). He noted that the hymen was not intact and was absent, and that he could see clearly into the vaginal opening (4-29-02 157, 159, 162, 173-174, 175). Cultures taken of the skin lesions determined that they were caused by either staphylococcus or streptococcus bacteria that did not usually come from a swimming pool,[15] but through contact with someone who had it (4-29-02 159, 161, 166-167, 172-173). He admitted that this infection was not necessarily spread through sexual contact (4-29-02 167). Daejanae also had a urinary tract infection caused by the same bacteria and an ear infection caused by bacillus feces, corium bacterium and staphylococcus aureus (4-29-02 160-161, 171). Throat cultures came back negative for bacteria (4-29-02 164-165).

Babitch opined that the fact that the hymen was absent could be consistent with sexual abuse, because it could be a sign that something penetrated the vagina, but there was no clear evidence of what could have penetrated the vagina and "it can be almost any object of the right size to tear that." (4-29-02 159-160). He acknowledged that some pre-pubescent girls do not have hymens (4-29-02 174). He could not say with any certainty that Daejanae had been sexually abused (4-19-02 176). His diagnosis was that Daejanae had a strep skin infection, and not gonorrhea, chlamydia or any other sexually transmitted disease, that the infection occurred some time ago, healed and re-occurred because it had not been treated (4-29-02 162, 169, 173). He also opined that excoriation could occur as a result of sexual abuse, but that it could

[15] When questioned by defense counsel, Babitch conceded it was possible the infection could have come from stagnant water (4-29-02 173).

also occur through scratching of an infected area or wiping with tissue paper (4-29-02 170-171).

Tremayne Burton told jurors Daejanae was able to tell her "forensic interviewer" what happened during an August 28, 2001 interview (4-30-02 52, 55). In the interim between the time she was seen at the hospital and when she gave her statement, Daejanae stayed with her mother at her grandmother's house and Burton admitted he had no personal knowledge of what conversations may have taken place regarding the incident during that time (4-30-02 56-57).

Edward Nicholas, defendant's step-father, received two telephone calls in mid-August, 2001,[16] one from defendant asking to pick up Mulvina, and one from Mulvina advising him where she was (4-30-02 66). He picked up Mulvina from a gas station after she had visited the dentist and brought her home to find defendant outside fixing his van (4-30-02 67, 72, 73). He did not remember seeing the children outside, but he remembered that the house was closed (4-30-02 67-68, 73-74, 76). After defendant was arrested and incarcerated, he let Mulvina into defendant's house and she took practically everything there, including the furniture, stove, refrigerator, washer, dryer and a computer, and later, she contacted him about retrieving some of defendant's business records (4-30-02 69, 71, 75).

Defendant testified that in August, 2001, he was a transportation driver for the VA Hospital and Children's Hospital and worked from 3:30 a.m. until 7:00 p.m. on Monday, Wednesday and Friday (4-30-02 78-79, 132, 137). On Tuesday and Thursday, he was done with work by 6:00 p.m. and went to church at 7:00 p.m. (4-30-02 80, 139). On Saturday, he worked beginning at 6:00 a.m. (4-30-02 79). On Sunday, he and his

[16] He could not remember the exact date (4-30-02 72).

family went to church all day (4-30-02 80). He sometimes went to church on Wednesdays if he was not busy (4-30-02 80, 139). It was against regulation for the children to ride in the van (4-30-02 79). He testified that he was hardly ever home, that he was home alone with the children just once since 1999 and denied that he was home with the children when Godfrey dropped Daejanae off after her visitations and that Daejanae never spent two weeks with Godfrey (4-30-02 136, 137-138, 139-140, 150-151, 154-155, 173-174, 176, 179, 184). Mulvina and Daejanae came to live with him in January, 1997, and he supported the family with money he alone earned (4-30-02 81, 140). He and Daejanae got along and he helped her through a crisis when her Godfrey beat her (4-30-02 82).

Deajuma, also called "LeLe" developed a rash that was eventually diagnosed as a strep throat (4-30-02 83-84). Doctors told defendant that "you can get [the infection] from someone that just came from the Caribbean or she was around some stagnant water...." (4-30-02 85). Because of this diagnosis, defendant drained the pool (4-30-02 85).

Daejanae complained of a sore throat, but defendant thought she just had a cold, and treated it with cough syrup and cough drops (4-30-2 86). On August 22, 2001, Mulvina told him that she did not want to sleep with him anymore because he wanted to sleep with Daejanae (4-30-02 89). Defendant told Mulvina "Daeja just want to start something." (4-30-02 89). Mulvina ran upstairs and started "hollering and screaming over molesting her daughter," referring to an incident that allegedly occurred on August 13, 2001 (4-30-02 89, 122). Defendant told her "if you think I'm messing with your daughter, call the police now." (4-30-02 89, 128). When Mulvina said that the police

"are not going to find anything," defendant told her to take Daejanae to the doctor,[17] but she declined (4-30-02 89-90, 128, 164, 165). Defendant denied calling police and did not remember Mulvina using the phone (4-30-02 90).

Later that evening, defendant and Mulvina discussed Daejanae's rash, noticing that it was similar to one "LeLe" had (4-30-02 127, 182). Mulvina did not indicate that she would leave the next day, but defendant told her that she had to be gone by the time he returned from work (4-30-02 123). Defendant called police on August 23, 2001, met with them twice, was eventually arrested and taken to jail because he had learned that they were looking for him (4-03-02 125, 126, 168). He was tested negative for disease (4-30-02 126).

Before she accused him of molesting Daejanae on August 22, 2001, Mulvina had accused defendant of molesting Daejanae in the back room, and this other accusation upset him (4-30-2 94, 96, 147). He told Mulvina that it was lie and that Daejanae had to go (4-30-02 94, 96, 149). He maintained that he and Daejanae were never alone in the back room, and that he was always with the three children together (4-30-02 95). He denied that the back room incident occurred (4-30-02 95). He also testified that there was never a situation where he was alone with Daejanae in the kitchen and he denied the alleged Florida sexual abuse incidents (4-30-02 98, 99).

Defendant told Mulvina to leave when it appeared that they were not getting along following the Florida reconciliation, but she did not immediately leave and asked for extra time (4-30-02 91, 101). He tried to "smooth things out." (4-30-02 101). She accused him of having affairs, even though he was not having any (4-30-02 102).

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[17] He testified during cross-examination that he did not offer to drive Mulvina and Daejanae to the hospital because Mulvina never said "let's go." (4-30-02 166-167, 183).

According to defendant, Mulvina went to the dentist just one time on August 13, 2001, when he took her there, and stayed in the van with the children until it was certain that the dentist would see her, and when it became apparent that the dentist would treat her, Mulvina told him to go home and would call when she was ready to be picked up (4-30-02 102-104). Because he was having problems with the van overheating, defendant worked on it upon his return, while the children remained outside with him, riding bicycles (4-30-02 105-106, 156). When Daejanae crashed her bicycle into the van, defendant asked her to roll up her pants leg so he could see if she had bruised her knee (4-30-02 106-107, 118, 154). After he showed her how to work the brakes, Daejanae hit the van a second time (4-30-02 107, 118, 119, 149-150). Mulvina and his stepfather arrived about 20 to 25 minutes later (4-30-02 119, 153-154). During that time, no one entered the house (4-30-02 120).

Defendant denied committing all three of the charged counts, telling jurors that he was not capable of such conduct, and denied beating Mulvina (4-30-02 122, 131). He surmised that Daejanae was accusing him of sexual assault was because Mulvina had put her up to it (4-30-02 131).

Linda Hganie told jurors she knew defendant through church, had known him for five years, and that he had a good reputation working with young people in the church (4-30-02 185). She recommended him for jobs in the community, and when he undertook them, he did a good job and the people he worked for said he was honest (4-30-02 188).

Over defense objection that he could not testify because he had been in the courtroom during much of the trial, Godfrey testified in rebuttal that Daejane never spent

two weeks with him and that when he dropped Daejanae off after his scheduled visitations, defendant was alone with the other children "lots of times." (4-30-02 191-192, 201-202). He admitted that he did not accompany Daejanae into the home when he dropped her off, but insisted that he knew that defendant was home alone with the other children because Daejanae would report back to him (4-30-02 195-196). He also admitted that he hated defendant (4-30-02 197).

The jury found defendant guilty of three counts of first degree criminal sexual conduct (5-1-02 67-68).

Sentencing

At sentencing, the prosecution argued that OV 11 and OV 13 were incorrectly scored (ST 3). OV 11 was lowered from 50 points to 25 points (ST 3). OV 13 was raised from zero points to 50 points because:

> ...in looking at the instructions for determining the appropriate points under this variable – I'm speaking of O.V. 13 – all crimes within a five year period, including a sentencing offense, shall be counted regardless of whether the offense resulted in a conviction (ST 4-5).

The changes raised defendant's minimum sentence range to 126 to 210 months (ST 5). The trial court sentenced defendant to concurrent 15 to 30-year terms (ST 9-10).

Appeal

Defendant appealed his convictions and sentences to the Court of Appeals, alleging four issues of error: (1) the trial court abused its discretion when it allowed the prosecution to amend its witness list shortly after jury selection began to add Leland Babitch, M.D. and would not adjourn the trial to allow the defense to retain an expert, (2) he received ineffective assistance when his trial attorney failed to object to testimony of his alleged physical abuse of Mulvina Westcarr, (3) he was denied a fair trial by the

admission, over objection that the witness had been present during the trial, of improper rebuttal testimony concerning a collateral matter that was not responsive to evidence introduced in his case-in-chief but was in response to denials elicited during his cross-examination, and trial counsel was ineffective when he failed to object to the testimony on this basis and (4) he must be resentenced because the trial court incorrectly scored OV 13, and the resulting 15 to 30-year sentences were imposed above the statutory sentencing guidelines without any substantial and compelling reasons to do so (Court of Appeals Docket No. 243042). On May 20, 2004, the Court of Appeals, Saad, P.J., and Sawyer and Fort Hood, J.J., affirmed defendant's convictions and sentences in an unpublished per curiam opinion (49a-c). It found that because the statutory requirements of MCL 767.40a(4) were satisfied, good cause for adding Dr. Babitch at the last minute was established, and defendant was unable to show that he was unfairly prejudiced because he failed to demonstrate he was unable to procure his own medical expert before the end of trial or that an independent medical examination would have produced evidence favorable to him and because the conflict between the first doctor who examined the complainant and Dr. Babitch, who performed a follow-up examination presented an ambiguity that benefited him (49a).

With respect to whether the trial court abused its discretion in denying defendant's request for a continuance, the Court of Appeals held:

> Likewise, defendant has failed to show an abuse of the trial court's discretion in denying defendant's request for a continuance. Defendant made his request on the first day of trial, a Thursday, during jury selection. The trial court noted that defense counsel agreed that he had had one in mind. The trial court observed that after the jury was selected, the trial would not begin until the following Monday so that if defendant concluded he needed a counter-expert, 'you need to get one.' Defendant therefore had Friday, the weekend, and the first two days of trial to talk with the

> expert 'he had in mind' and determine whether it would avail the defense anything to present the doctor's testimony. Defendant also could have used this time to interview Dr. Babitch and determine if presentation of his own expert would be appropriate.
>
> Moreover, the trial court did not preclude defendant from requesting a continuance if it became clear that he had secured the testimony of his own doctor but that the doctor was not immediately available to testify. Instead, it appears that the defense concluded that it would not pursue its own medical witness. This strategic decision makes sense because there was an ambiguity between the testimony of the initial examining physician and the doctor who did the follow-up examination. This ambiguity gave defendant a basis on which to argue that someone had physically molested the complainant *after* the initial examination, or that someone had manipulated the complainant to make it appear she had been molested. Accordingly, defendant has failed to establish an abuse of the trial court's discretion (49b).

On July 6, 2004, defendant-appellant filed a *Pro Per Application for Leave to Appeal* with this court, alleging that the trial court abused its discretion when it allowed the prosecution to amend the witness list to add Dr. Babitch and would not adjourn trial. He also raised two issues not raised below: (1) ineffective assistance of counsel and (2) denial of discovery.

In an order dated January 21, 2005, this court directed oral argument on defendant's *pro per* application. The order stated:

> The parties shall include among the issues to be addressed whether the Wayne Circuit Court abused its discretion in denying defendant's request for a continuance (49d).

This court also allowed defendant to request appointment of counsel, and directed the Wayne County Circuit court to appoint counsel if it determined that defendant was indigent, and allowed the trial court to consider appointing the attorney who represented defendant in the Court of Appeals (49d). This Court further allowed the parties to file supplemental brief within 35 days of the Wayne County Circuit Court's order if counsel was appointed to represent defendant (49d).

ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE PROSECUTION'S TRIAL DAY MOTION TO INDORSE AN ADDITIONAL EXAMINING DOCTOR AS A WITNESS AND IN REFUSING TO ALLOW DEFENDANT-APPELLANT A CONTINUANCE IN ORDER TO PREPARE TO CROSS-EXAMINE HIM.

Standard of Review & Issue Preservation

The trial court's decision to allow the prosecutor to add or delete witnesses called at trial is reviewed for an abuse of discretion. *People v Burwick,* 450 Mich 281 (1995); *People v Herndon,* 246 Mich App 371, 402 (2001). A trial court's decision whether to grant a continuance is reviewed for an abuse of discretion. *People v Jackson,* 467 Mich 272 (2002); *People v Charles O. Williams,* 386 Mich 565, 575, 578 (1972); *People v Peña,* 224 Mich App 650, 660 (1997). The Court of Appeals used this abuse of discretion standard to assess this issue:

> An abuse of discretion is found when the trial court's decision is so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Callon,* 256 Mich App 312, 326; 662 NW2d 501 (2003), citing [*People v] Gadomski,* [232 Mich App 24, 32-33; 592 NW2d 75 (1998)] *supra* at 32-33. (49a).

This standard, derived from *Spaulding v Spaulding,* 355 Mich 382 (1959), has been used in a variety of criminal contexts. See *People v Hine,* 467 Mich 424, 250 (2002) and *People v Layher,* 464 Mich 756, 777 (2001) (assessing an abuse of discretion in the admission of evidence) and *Jackson, supra,* 277 (assessing an abuse of discretion in a trial court's denial of a prosecution request for a continuance to bring in a missing witness). However, the propriety of using the *Spaulding* standard in criminal cases has

been questioned. In *Charles O. Williams, supra,* this Court held that in the criminal context, a different abuse of discretion standard should be observed:

> While the rule laid down in *Spalding* is generally the correct rule to apply, a somewhat stricter standard should be observed in criminal cases where loss of freedom by incarceration is often the penalty that a convicted defendant will suffer. *Charles O. Williams, supra,* 573.

In the context of sentencing guidelines departures, *People v Babcock*, 469 Mich 247 (2003) also concluded that the *Spaulding* abuse of discretion standard was improper:

> The *Spalding* abuse of discretion standard is one that entitles the trial court the utmost level of deference. In our judgment, while the Legislature intended to accord deference to the trial court's departure from the sentencing-guidelines range, it did not intend this determination to be entitled to *Spalding's* extremely high level of deference.
>
> . . .
>
> Therefore, the appropriate standard of review must be one that is more deferential than *de novo*, but less deferential than the *Spalding* abuse of discretion standard. At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. See *People v Talley*, 410 Mich 378, 398, 301 NW2d 809 (1981) (LEVIN, J., concurring), quoting *Langnes v Green*, 282 US 531, 541, 51 SCt 243, 75 LEd 520 (1931) ("'The term "discretion" denotes the absence of a hard and fast rule.'"). When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. *Babcock*, 266, 269.

Notwithstanding *Jackson, supra,* a trial court's refusal of a defense request for a continuance in a case where a late witness is endorsed should not be accorded *Spaulding's* high extremely high level of deference, because unlike the prosecution, a defendant who is unable to obtain a continuance to prepare for the late witness or retain experts or witnesses to rebut the new witness will suffer the penalty of loss of freedom

by incarceration. Defendant suggests that the *Babcock* standard is the proper one in this context.

Defendant objected to the endorsement of Leland Babitch, M.D. and requested an adjournment (4-25-02 150). This issue was raised and decided against defendant in the Court of Appeals (49a-b).

Discussion

Introduction

Up until the middle of jury selection, the defense operated under the impression that the prosecution's endorsed medical expert would testify that the hymen was intact and that evidence of sexual abuse was inconclusive. After a lunch break during jury selection, the prosecution learned about a new medical expert and asked to be allowed to indorse him. The defense objected, and asked for a continuance in order to consult with an expert to determine whether it needed a witness to rebut the late witness' findings and to adequately prepare to rebut the testimony. The trial court allowed the witness and denied the request for a continuance.

In Subpart A of this discussion, defendant explains why the trial court abused its discretion in allowing Dr. Babitch's late endorsement. The Court of Appeals (Saad, Sawyer and Fort Hood) incorrectly found that the statutory requirement of MCL 767.40a were satisfied.

In subpart B of this discussion, defendant explains why the trial court abused its discretion when it would not grant a defense request for a continuance. The Court of Appeals did not discuss the factors which should be considered in evaluating whether the trial court abused its discretion by refusing a defense request for a continuance

following late endorsement of a witness. *People v Charles O. Williams*, 386 Mich 565 (1972).

Facts

Jury selection began on April 25, 2002 and progressed through the morning without concluding (4-25-02 3-142). Up until this time, the defense assumed that a physical examination of Dejanae conducted on or about August 23, 2001 showed an intact hymen (4-30-02 14). After the lunch break, the prosecution announced that the Daejanae's mother had produced a page from the medical report that neither attorney had seen that indicated that during an August 27, 2001 follow-up examination, doctors noticed that the hymen was not intact (4-29-02 159). The prosecutor proposed that the jury be impaneled anyway and moved to endorse the second examining physician (4-15-02 143, 145). The defense asked for an independent examination and an adjournment. The trial court proposed:

> In looking at this situation right now, the way it appears that if the People move to endorse the second doctor, who did the last of the examinations from the pediatric clinic.
>
> And if the Court grants that motion, then what will happen is the evidence that will come in, in both these reports, the substance of the reports, the testimony of both doctors coming in. We have an issue of fact created for the jury.
>
> With respect to an independent examination, I don't know or it is not my thinking that that would really be beneficial at this time to have the minor plaintiff undergo a third examination because either the jury could pick which report they wanted.
>
> One would be stronger for the people and one would be stronger for the defense is I don't think that the terms or at least the posture of the evidence going into trial would be served by a third examination.
>
> So what I would propose to do is go ahead and finish the jury selection, we're not going to get to any evidence or even opening statements, I don't think today, unless we get a jury real quick (4-25-02 148).

The trial court emphasized its "loathing" to discharge the jury and start over "on this basis." (4-25-03 149). The defense objected because the last minute revelation prevented it from finding an expert to rebut the new information:

> And this evidence in terms of whether the hymen is intact or not, it's so crucial to a case that involves penetration. I mean that's very germane to it.
>
> And I feel that I should have the right to make the decision in terms of whether I want an expert to confirm what the findings are number one.
>
> Or to maybe even challenge whatever findings their doctor is saying in regards to whether there was some type of sexual abuse going on.
>
> Because I'm assuming that he's going to say that this hymen is not intact, that that's evidence of the particular sexual abuse and I should have the right to have an expert to challenge that. And I cannot do that at this late date and time, you know, find my own (4-25-02 150).

The discussion continued:

> THE COURT: Well let me say this. I noticed you filed a defendant's witness list and it's dated April 22.
>
> MR. DuBOSE [defense counsel]: Right.
>
> THE COURT: And item number four, you listed medical expert to be named.
>
> MR. DuBOSE: Right, and the reason I did that, your Honor.
>
> THE COURT: So I'm presuming that you at least wanted to call someone. Did you have anybody at that point.
>
> MR. DuBOSE: I had someone. I had totally abandoned that position after I had discussions with Mr. Less.
>
> THE COURT: After the 22nd of this month you abandoned that position?
>
> MR. DuBOSE: Yes because I had discussions with Mr. Less who indicated that the doctor who made the original report that said that the hymen was intact, I think the words you used were inconclusive in terms of whether there was sexual abuse. Was that the word I recall correctly of our conversation.
>
> MR. LESS [prosecutor]: I believe it was something to that effect. It would be like basically with the report says, suspected child abuse. It may be there, it may not be.
>
> But his report, his recollection after reviewing the report was that he put hymen intact. He did talk about that expurgation and diluted skin, again, we did not know about the follow-up report until we walked in after lunch.

MR. DuBOSE: So once I'm under the impression that it's inconclusive from this particular doctor who is saying that the hymen is intact, there's no need for me to have an expert.

THE COURT: When did you make this determination that there was no need for you to have one?

MR. DuBOSE: After I talked to Mr. Less, what day was that?

MR. LESS: It was either last week –

MR. DuBOSE: It was one day last week, your Honor.

THE COURT: All right.

MR. DuBOSE: I have been trying. I've made efforts to determine whether I needed this medical expert from calls to Mr. Less for probably a month.

MR. LESS: That's true.

MR. DuBOSE: I've been making several efforts and my client has been on me in regards to a medical expert and I was very concerned about that particular issue.

And then I've been over a month now making efforts to contact him to clear up that issue whether I needed that or not. And he was in trial, and I was able to finally get to him to resolve that issue last week and that's part of the reason why I was as late as I was with my witness list.

THE COURT: Then why didn't you elicit your own expert?

MR. DuBOSE: As of a month ago, I was under the impression that I needed –

THE COURT: I'm saying as of this Monday, April 22, the date that's on the witness list.

MR. DuBOSE: I put that down to protect myself, probably, you know, because I hadn't talked to Mr. Less.

And once I confirmed with Mr. Less that this doctor was saying that, yes, it was a situation where the hymen was intact, and that it was inconclusive as to evidence of the sexual abuse, I made that determination that my expert wasn't necessary.

THE COURT: As of the 22nd of April, did you have an expert?

MR. DuBOSE: As of the 22nd of April I had an expert in mind. That list done, your Honor, I prepared it in terms of it being typed, in term of its form almost a month ago is all I'm trying to say. I didn't file it until later on.

Defendant objected to the late endorsement of the physician and asked for an adjournment:

Your Honor, I would object then to the endorsement of this particular witness. I would ask that this witness not be endorsed, and if we are going to proceed to trial we go with the first witness that we have. And if the Court is going to endorse this new doctor, then I would ask that this matter be adjourned to allow me either have an independent expert, and

independent evaluation of this child, or at least have the time to re-prepare for trial and have another expert for my side (4-25-02 154-155).

The trial court allowed the late endorsement and denied the request for an adjournment:

I'm going to allow the endorsement to be made. The request for the adjournment is denied, and we will go forward.

It's other evidence out there, I can't ignore it. And you had been planning for an expert, or you hadn't designated one.

So you know, if you have been planning for one, you may have some time, I don't know, what you can do between now and when you have to put on your proofs. But if you think you need one, you need to get one (4-25-02 155).

A. The late endorsement violated MCL 767.40a

The prosecution's late endorsement of Babitch was a clear violation of MCL 767.40a, requiring the prosecution to send its witness list to the defense "[n]ot less than 30 days before the trial." The prosecution must advise the defense of all known witnesses *and who among them* it will produce at trial so the defense can determine which witnesses the prosecution will or will not call and prepare a defense. *Burwick, supra.* In this case, the prosecution filed no witness list at all. The lower court file contains a *Felony Information,* but no witness list. Late additions are allowed "upon leave of the court *and* for good cause shown." MCL 767.40a(4).

Burwick held that MCL 767.40a excused the late endorsement of a witness who was "not known to the prosecutor or to the police," because the witness was not named in any police report, and had not spoken to police before the prosecution discovered him one day before it moved to endorse him. *Id.,* 294. The prosecution cannot make that same claim in this case. There was no good cause to add Babitch after jury selection had begun, because the prosecution already knew that something was "amiss:"

> ...What made me suspect something was amiss, though, was the fact that it say (sic) that hymen is not intact on the records that Mr. Dubose and I have and yet they proceed to draw the pictures as they normally do when they do find injury.
>
> The one that we do have say (sic) that the vaginal area show signs of expurgation, which would be something roughing or wearing up against it.
>
> Also that the skin was diluted , which I also believe the doctors will testify that that's the process of skin layers being rubbed off (4-29-02 145).

The existence of drawings indicating injury and descriptions of injury should have alerted the prosecution that perhaps a second physician did them. Further, had the prosecution met with Mulvina to prepare for trial in advance of that trial, it would have learned about the page she had withheld from the report.

B. The trial court abused its discretion when it denied a continuance

The Due Process Clause of US Const, Am XIV protects a defendant in a criminal case from unfair surprise by incriminating evidence. See generally, *Wardius v Oregon*, 412 US 470 ; 93 S Ct 2208; 37 L Ed 2d 82 (1973) (where state requires the defendant to disclose alibi witnesses before trial, due process requires reciprocal discovery to defendant of alibi rebuttal witnesses). Even where the prosecutor is not at fault for failing to disclose surprise evidence before trial, a defendant may be entitled to a continuance to prevent unfair prejudice. While *Burwick, supra* held that the prosecutor had no duty to discover the names of its witnesses before trial, this Court observed:

> This is not to say that in a different situation the failure to grant a continuance upon discovery of a previously unknown witness could not constitute an abuse of discretion, *People v Charles O. Williams*, 386 Mich 565; 194 NW2d 337 (1972).... *Id.*, 293-294.

When a trial court allows the late endorsement of a prosecution witness, a continuance should be granted to prevent prejudice to the defense. *People v Suchy,* 143 Mich App 136, *lv den* 424 Mich 855 (1985); quoting *People v Meadows,* 80 Mich App 680 (1977);

People v Harrison, 44 Mich App 578 (1973). The decision to grant a continuance in a criminal trial is governed by MCL 768.2 and is within the trial court's discretion. *Suchy,* quoting *People v Wilson,* 397 Mich 76 (1976); *People v Powell,* 119 Mich App 47 (1982).

> The decision is a delicate task of preserving the defendant's right to a fair trial while preventing abuse or disruption of trial procedures to the prejudice of a speedy, orderly, and impartial criminal justice system. *Suchy,* quoting *People v Eddington,* 77 Mich App 177, 187 (1977).

In *Charles O. Williams, supra,* defendant's appointed counsel asked to withdraw because the defendant had retained another attorney, but the trial court denied the motion and ruled that no continuance would be granted to allow a substitution of counsel. This Court reviewed some of the Federal authorities dealing with the trial court's discretion to grant continuances, including *Ungar v Sarafite,* 376 US 575, 589; 84 S Ct 841; 11 L Ed 2d 921 (1964):

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. *Avery v Alabama*, 308 US 444 [60 S Ct 321; 84 L Ed 377 (1940)]. *Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. Chandler v Fretag*, 348 US 3 [75 S Ct 1; 99 L Ed 3 (1954)]. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Nilva v United States*, 352 US 385 [77 S Ct 431; 1 L Ed 2d 415 (1957)]." (Emphasis in original.)

Applying *Ungar, t*his Court held that the right to counsel was a precious constitutional right that could not be outweighed by a trial court's desire to avoid a trial delay:

> We agree that the courts must do everything necessary to avoid delay. But, this cannot include interfering with a defendant's right to a fair

> trial. As the United States Supreme Court stated in *Powell v Alabama*, [287 US 45; 53 S Ct 55; 77 L Ed 2d 158 1932] supra, p 59:
>
> 'The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob.
>
> Thus, the desire of the trial courts to expedite court dockets is not a sufficient reason to deny an otherwise proper request for a continuance. *Charles O. Williams, supra,* 577.

See also *Jackson, supra,* 279 n 7 ("'We take this opportunity to remind the bench, however, that MCR 2.503 governs the decision whether to grant a continuance, and that "the desire of the trial courts to expedite court dockets is not a sufficient reason to deny an otherwise proper request for a continuance.' *Charles O. Williams, supra* 386 Mich at 577.").

The Court of Appeals' decision erred because it did not discuss the factors this Court enumerated in *Charles O. Williams, supra,* see also *Wilson, supra,* that should be considered in evaluating whether the trial court abused its discretion by refusing a defense request for a continuance following late endorsement of a witness. Those considerations are: (1) whether defendant was asserting a constitutional right; (2) whether defendant had a legitimate reason for asserting the right; (3) whether defendant asserted the right in a timely fashion; (4) whether prior adjournments occurred at defendant's request; and (5) whether defendant had demonstrated prejudice. If the Court of Appeals had done so, it would have reversed defendant's convictions and ordered a new trial.

(1) Defendant asserted a constitutional right

The rights defendant asserted were of constitutional magnitude. In addition to the Sixth Amendment guarantee of effective assistance of counsel, general principles of due process are implicated where there is a claim of lack of adequate time to prepare for trial. See *People v Taylor*, 110 Mich App 823 (1981); *Wilson, supra*. Because the witness in question was an expert, the evidence he offered was not of the sort that could be evaluated without adequate technical preparation. At trial, defendant asserted that he needed to meet with a physician to confirm and/or challenge Dr. Babitch's findings. He also asserted that he wanted to meet with his expert to determine whether he needed to call a defense expert, implicating his Sixth Amendment right of confrontation. Under similar circumstances in *Suchy,* the Court of Appeals held these circumstances were constitutional in nature, and this Court held that such circumstances were constitutional in *Wilson, supra.*

(2) Defendant had a legitimate reason for asking for a continuance

Defendant had a legitimate reason for requesting a continuance, because the prosecution's motion to indorse Dr. Babitch was a surprise. The prosecutor did not know about him, or that he had conducted a second examination, until after the lunch break during jury selection on the first day of trial when Mulvina produced the missing page from the medical report (4-25-02 152). This development significantly altered the case against defendant, because the defense was operating under the understanding that the medical evidence showed an intact hymen, implying that there had been no penetration, and implying no sexual abuse. Although that report talked about expurgation and diluted skin, there could be other explanations for those conditions

other than penetration. In *Wilson,* the defense moved for an adjournment on the first day of trial after the trial court allowed the prosecution to endorse two additional witnesses, and this Court held that to be a legitimate reason to request one. *Id.,* 82.

(3) Defendant timely asserted his request for a continuance

The trial court made much of the fact that defendant had listed a "medical expert to be named" on his April 22, 2002 witness list, implying that his request was not timely, but that ignores the undisputed fact that defense counsel drafted that list before he could confirm with the prosecutor that the endorsed physician had concluded that the hymen was intact and that evidence of sexual abuse was inconclusive. In fact, it took defense counsel over one month to get that confirmation. Based on the prosecutor's representations that the medical report showed that the hymen was intact and that evidence of sexual abuse was inconclusive, defendant elected to forego calling his own expert. If the prosecutor did not know about Dr. Babitch's existence until after the lunch break on the first day of trial, how can it be expected that defendant would know about him? Under similar circumstances in *Wilson,* this court held that the defense was not guilty of negligence when it made its trial day motion for a continuance.

(4) Whether there had been prior defense continuances

There is nothing in the record indicating that the defense asked for a prior continuance.

(5) Denial of the continuance caused prejudice

With respect to prejudice, the Court of Appeals held:

> Defendant has not established prejudice because he has failed to demonstrate that he was unable to procure his own medical expert before the end of the trial or that an independent medical examination would have produced evidence favorable to the defense. Additionally, the

> existing situation—where the first doctor who examined the victim after the alleged assault concluded that her hymen was probably intact and the second doctor who performed the follow-up examination several days later concluded that it was not—presented an ambiguity in the evidence that benefited defendant (49a).

This was the wrong standard by which to assess prejudice. Defendant did not have to point to a specific piece of evidence, or claim that new evidence has been discovered, to demonstrate prejudice on appeal. The requirement that the defendant show prejudice is derived from *Wilson, supra,* where this Court reversed the defendant's conviction because the trial court had refused to grant the defendant a reasonable continuance in order to prepare for the testimony of expert witnesses who were endorsed on the day of trial. Like this case, *Wilson,* involved criminal sexual conduct charges and at least one of the late endorsed witnesses was a hematologist who was to testify that sperm were contained in the complainant's underpants. This Court held that an adequate demonstration of prejudice had been shown because:

> Although the primary defense to the rape charge in this case was consent, the defendant *might have* lost a possible defense (*i.e.,* no intercourse occurred) by his *alleged inability* to adequate cross-examine the chemist. *Id.,* 89, emphasis added.

Concurring, Justice Levin stated that reversal was properly ordered, not because defendant had demonstrated prejudice, but because there was reason to believe that he "may have been prejudiced". *Id.* See also *People v Bennett,* 116 Mich App 700, 709 (1982).

Even though defendant's main defense was that Mulvina had induced Daejanae to make false allegations of sexual molestation because of her own animosity with defendant (49b), with the endorsement of Dr. Babitch, defendant *might have* lost his possible defense of no intercourse occurring by his inability to adequate cross-examine

him and by his inability to retain his own expert and have an independent examination to refute or contradict Dr. Babitch's findings. Defendant was charged with several serious offenses involving, upon conviction, a life sentence, requiring adequate time for preparation in order to effectively defend against those charges.

This court can consider the extent and effectiveness of cross-examination of the late endorsed witness. *People v Umerska,* 94 Mich App 799 (1980); *Meadows, supra.* Although defense counsel elicited from Babitch that it was true that some pre-pubescent girls did not have hymens, that information was not specific to Daejanae (4-30-02 174). The prosecution took advantage of this handicap in its closing argument:

> Look at what Daejanae told you. Look at what the medicals show. She doesn't have a hymen. I mean, it's easy to mistake something there, I mean if there's all this discharge. When that is clear the Doctor says, I can see in the vagina. You can't mistake that. It's gone. Where did it go?
>
> Do we have any medical records that says she was born without it? No. Nobody showed us that. It's gone. It's gone like when the doctors actually go in and do the full exam --
>
> MR. DUBOSE: Your Honor, I'm going to object to any medical records that show that show that she didn't have it when she was born. I think that is a shifted burden.
>
> MR. LESS: So we have – nobody said she didn't have it when she was born (5-1-02 45).

When defense counsel objected to that comment, telling the trial court that if he had been able to engage an expert, that person would have would have testified about "damage" done to a six-year-old, the trial court responded by explaining why it would not adjourn the trial (5-1-02 59-60).

The prosecution did not have a strong case. Defendant's guilt essentially depended on the jury's resolution of a credibility contest between defendant and Daejanae. Daejanae was vague about the incidents, admitted that she did not remember many details, and admitted that a lot of people, including Mulvina, had asked

questions to "help" her remember what happened (4-29-02 59, 64, 70-71). Defendant's ability rebut or contradict Dr. Babitch was impeded by the trial court's refusal to adjourn the case to allow him to retain an expert who could conduct an independent examination. As in *Charles O. Williams, supra,* defendant's Sixth Amendment guarantee of effective assistance of counsel, general principles of due process and his Sixth Amendment right of confrontation outweighed the trial court's desire to expedite its docket and the trial court abused its discretion when it denied his request for a continuance after Dr. Babitch was indorsed. It is not as if a jury had been selected and sworn and the prosecution discovered Dr. Babitch near the end of its case-in-chief. At the point that the indorsement was made, jury selection had not even been completed. All the trial court had to do was dismiss the jury and order a continuance. The trial court should have heeded this Court's admonitions in *Jackson, supra* and *Charles O. Charles O. Williams, supra*: "the desire of the trial courts to expedite court dockets is not a sufficient reason to deny an otherwise proper request for a continuance." *Charles O. Williams, supra*, 577; *Jackson, supra,* 279 n 7. Defendant is entitled to a new trial.

2. DEFENDANT-APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL ATTORNEY FAILED TO OBJECT TO TESTIMONY OF HIS ALLEGED PHYSICAL ABUSE OF MULVINA WESTCARR.

Standard of Review & Issue Preservation

The burden is on the defendant to establish a claim of ineffective assistance of counsel. *Kowalek v United States,* 534 F Supp 186 (ED Mich, 1982); *People v Armstrong,* 124 Mich App 766, 335 NW2d 687 (1983). It must be shown that trial counsel's performance was objectively unreasonable in light of prevailing professional

norms and the defendant must overcome the presumption that the challenged action might be considered sound trial strategy and show that the deficiency was prejudicial, defined as "a reasonable probability that more likely than not, the outcome of the proceeding would have been different but for counsel's errors." *Strickland v Washington,* 466 US 668 (1984); *People v Pickens,* 446 Mich 298 (1994); *People v Carbin,* 463 Mich 590, 599-600 (2001). In evaluating counsel's performance, this court should review defense counsel's overall performance. *People v Coyle,* 104 Mich App 636, 639; 305 NW2d 275 (1981).

Defendant did not move for a *Ginther* hearing, but a failure to do so does not preclude this court from reviewing a claim of ineffective assistance of counsel, because the record contains enough detail concerning the alleged deficiencies in representation to permit resolution of the claim, and counsel's error was plain error. *People v Bettistea,* 173 Mich App 106, 127; 434 NW2d 138 (1988).

Discussion

Mulvina Westcarr took every opportunity she could to tell the jury that defendant was an abusive spouse. She testified went to Florida with her children "because he was abusive," and that her mother drove "because Mr. Westcarr was beating me and he called her and asked her to come get me out of the house." (4-29-02 109, 110, 139, 148). She told told jurors:

> He was abusive and I like a change. When I was pregnant, he started beating me. The relationship was different. He was abusive towards me. (4-29-02 122).

She told jurors that after defendant was arrested for these charges, he contacted her and asked her to get her things, saying "you need clothes for your funeral." (4-29-02

130). Defense counsel did not object to this testimony. His failure to object to this testimony denied defendant his right to effective assistance of counsel because it was inadmissible under MRE 404b:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

People v Vandervliet, 444 Mich 52, 55 (1993) set forth the test for admissibility of so-called "other acts" evidence: (1) it must be offered to prove "something other than a character to conduct theory" prohibited by MRE 404b; (2) the evidence must fit the relevancy test articulated in MRE 402, as "enforced by MRE 104(b);" (3) the evidence's probative value must substantially outweigh its prejudicial effect under MRE 403 and (4) a party may request a limiting instruction if the trial court allows the evidence. *Vandervliet* continues to state the law accurately. *People v Sabin (After Remand),* 463 Mich 43 (2000).

Mulvina's testimony about defendant's alleged abuse was inadmissible because it was not relevant. Relevance is the critical threshold issue in determining admissibility under MRE 404b. *Sabin,* 56-57; *Vandervliet,* 74. See also *People v Hawkins,* 245 Mich App 439 (2001). "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. Any alleged abuse or beatings *of Mulvina* were not logically relevant to an element of the charged first degree criminal sexual conduct charges *involving Daejanae,* and these

alleged beatings of Mulvina had nothing to do with whether he subsequently sexually assaulted Daejanae. Daejanae never testified that the incidents were accompanied by beatings. His alleged abusive history certainly did not explain why he would molest Daejanae.

Mulvina's testimony that defendant was an abusive spouse was also inadmissible because its probative value was substantially outweighed by its unfair prejudice. Any alleged beatings of Mulvina had nothing to do with defendant's theory of the case. His theory of the case was that Mulvina concocted the charges, not because he had been abusive, but to use Daejanae as a weapon to break up his marriage, because she thought he was having affairs. Testimony of alleged abuse would not be consistent with that theory.

MRE 404b(2) also requires that before the evidence is presented, the prosecution must give the defense written notice:

> The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. MRE 404b(2).

There is no written notice in the court file. The prosecution committed plain error when it did not give the defense notice, because the rule unambiguously requires notice to the defense at some time *before* the prosecutor introduces the other acts evidence. *Hawkins,* 453. Had the prosecution given the requisite notice, the defense would have moved to suppress it.

Counsel's error was not harmless. The prosecution did not have a strong case. Defendant's guilt essentially depended on the jury's resolution of a credibility contest

between defendant and Daejanae. Daejanae was vague about the incidents, admitted that she did not remember many details, and admitted that a lot of people, including Mulvina, had asked questions to "help" her remember what happened (4-29-02 59, 64, 70-71). The introduction of this testimony denied defendant a fair trial because it may have diverted the jury from an objective appraisal of defendant's guilt or innocence for all the crimes charged and led it to convict him because he was violent towards Mulvina. *People v Ullah,* 216 Mich App 669, 676 (1996), quoting *People v Robinson,* 417 Mich 661, 664-665 (1983).

There was no possible reason for defense counsel to not object to this testimony. In fact, he compounded the error by bringing out more of this testimony:

Q Mr. Westcarr was in jail at that time, is that correct?
A Yes, he was.
Q And didn't you get a PPO even though you knew he was in jail?
A I was going to get a PPO on him.
Q Ma'am –
A I know that he abused me and how he was.
Q And when he abused each time that you're telling us he abuse you, you went down and got PPO's on him those times, haven't you?
A He told me he would kill me.
Q He told you he would kill you?
A Yes, he did (4-29-02 134-135).

He also elicited from Mulvina that she tried to leave defendant, that he did not tell her to get out and "I tried to leave and he tried to choke me, told me if I leave he was going to kill me." (4-29-02 148). There was no strategic reason for continuing with this line of questioning, because it did not demonstrate that Mulvina used Daejanae as a weapon to break up her marriage to defendant. Defendant is entitled to a new trial.

3. DEFENDANT-APPELLANT WAS DENIED A FAIR TRIAL BY THE ADMISSION, OVER OBJECTION THAT THE WITNESS HAD BEEN PRESENT DURING THE TRIAL, OF IMPROPER REBUTTAL TESTIMONY CONCERNING A COLLATERAL MATTER THAT WAS NOT RESPONSIVE TO EVIDENCE INTRODUCED IN HIS CASE-IN-CHIEF BUT WAS IN RESPONSE TO DENIALS ELICITED DURING HIS CROSS-EXAMINATION, AND TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO OBJECT TO THIS TESTIMONY ON THIS BASIS.

Standard of Review & Issue Preservation

The trial court's ruling that a witness can testify in rebuttal is reviewed for an abuse of discretion. *People v Figgures,* 451 Mich 390 (1996).

Defendant objected rebuttal witness Godfrey Norman on the basis that he had been in the courtroom during defendant's testimony (4-30-02 201-202). He did not object on the basis that the testimony was the improper subject for rebuttal, but this court can review the alternative ground because this was plain error which "undermined[d] the fundamental fairness of the trial and contribute[d] to a miscarriage of justice." *United States v Young,* 470 US 1, 13; 105 S Ct 1038; 84 L Ed 2d 1 (1985). Errors to which there was no objection in the trial court that undermine the fairness of the trial are reviewed for manifest injustice. *People v Van Dorsten,* 441 Mich 540, 545; 494 NW2d 737 (1993).

Discussion

In his direct examination, defendant testified that in August, 2001, he was an independently contracted transportation driver for the VA Hospital and Children's Hospital and worked from 3:30 a.m. until 7:00 p.m. on Monday, Wednesday and Friday (4-30-02 78-79, 132, 137). On Tuesday and Thursday, he was done with work by 6:00 p.m. and went to church at 7:00 p.m. (4-30-02 80, 139). On Saturday, he worked

beginning at 6:00 a.m. (4-30-02 79). On Sunday, his family went to church all day (4-30-02 80). He sometimes went to church on Wednesdays if he was not busy (4-30-02 80, 139).

During cross-examination, the prosecution established that defendant was "hardly ever home," and that he had been home alone with the children "once since 1999." (4-30-02 136, 137-138, 139-140, 150-151, 154-155, 184). The prosecution also elicited these specific denials:

> Q Isn't it true that Daejanae's father used to drop her off at your house and you'd be home alone with the other two children?
> A No, sir.
> Q Isn't it true that Daejanae never went and spent two weeks with her father like you said? Isn't it true that she never went and spent those two weeks with her father? She's always been with her mother other than day visits, isn't that true?
> A No, sir.
> Q You're saying that she went and not only spent two weeks, but that the father never dropped her off and found home alone with the children?
> A No, sir (4-30-02 173-174).

The prosecution then called rebuttal witness Godfrey Norman to contradict the claims that Daejanae spent two weeks with him and that when he dropped Daejanae off after one of his scheduled visitations, defendant was not alone with the other children (4-30-02 191-192, 201-202).

Apparently, the defense objected because Godfrey had been in the courtroom before he testified (4-30-02 201-202). However, when it summarized the bench conference where the objection took place, the trial court did not say why it allowed Godfrey to testify. The only possible reason he was allowed to testify was because the prosecution said that when it became aware that it was necessary to call him, he had Godfrey leave the courtroom at some unspecified time (4-30-02 202).

The decision to exclude a witness who has violated a sequestration order is within the trial court's discretion. *People v Boose,* 109 Mich App 455, 474-475 (1981). A defendant who complains on appeal of a violation of a sequestration order must demonstrate that prejudice resulted. *People v Hill,* 88 Mich App 50, 65 (1979). *People v Solak,* 146 Mich App 459, 669 (1985) refused to find an abuse of discretion where the witness was present for only a few minutes during the defendant's testimony and the testimony was not related to the rebuttal testimony for which the witness was being called. Here, Godfrey was present during the entire trial,[18] including defendant's testimony, for which he was called to rebut.

Further, it was an abuse of discretion to allow Godfrey's testimony because he testified about a collateral issue having nothing to do with whether defendant sexually assaulted Daejanae, and his testimony did not respond to evidence presented by defendant in his direct examination, but was in response to new denials elicited by the prosecution during defendant's cross-examination. Admission of the testimony denied defendant of his due process rights to a fair trial, US Const Am XIV; Const 1963, art 1, §15.

Rebuttal evidence is limited to refuting, contradicting, or explaining evidence presented by the opposing party. *People v Leo,* 188 Mich App 417, 422 (1991):

> Rebuttal testimony may be used to contradict, repel, explain, or disprove evidence presented by the other party in an attempt to weaken and impeach it. The test for error regarding rebuttal evidence is whether it is justified by the evidence it is offered to rebut. A prosecutor cannot elicit a denial during cross-examination of a defense witness and use such denial to inject a new issue into the case.

[18] See, for example 4-29-02 106.

In *People v Rice (On Remand),* 235 Mich App 429 (1999), the defendant made general denials of culpability in his direct examination. He specifically denied having a gun on the night of the incident. He specifically testified that he lent a VCR to an individual, rather than selling it, and only retrieved it in order to re-lend it to another person. A rebuttal witness contradicted Rice's direct testimony by testifying that defendant had sold the VCR to him, rather than lending it, and wanted more money for it. This rebuttal witness also testified that Rice did have a gun, which he waived around as he announced that he was taking the VCR. *Id.,* 442. This Court held that the rebuttal testimony was proper because it contradicted evidence presented by Rice on *direct,* not cross-examination:

> While it is true that defendant continued the same general denials on cross-examination, the prosecutor did not elicit *different* denials from defendant and then rebut those fresh denials with the witness' testimony contrary to *Leo, supra.* The rebuttal testimony was offered for the proper purpose of contradicting or disproving evidence presented by defendant and reaffirmed the prosecution's theory of the case. In any event, the rebuttal testimony was cumulative to evidenced presented in the prosecution's case in chief and therefore did not constitute the introduction of new evidence or issues into the case. *Id.,* 443 (emphasis added).

Figgures, supra also focused on whether the rebuttal testimony was introduced to counter the defendant's case, in which instance it would be admissible, or whether the rebuttal testimony was in response to a denial elicited on cross-examination of the defendant by the prosecutor to facilitate admission of *new* evidence, in which case it would not be admissible. In that case, the trial revolved around whether Figgures intended to commit a felony once he broke into his ex-wife's house. Figgures claimed that he had come over to his ex-wife's house to retrieve some of his possessions and had no intent to commit any felony. In his direct examination, Figgures testified that

since their divorce, he and his ex-wife had made attempts at reconciling, claiming he stayed at her house from December 8, 1989 until December 21, 1989, and again from January 2, 1990 until "January 20th or so of 1990." *Id.,* 395. He further testified in his direct testimony that "most definitely" he was sleeping with his ex-wife and they were having a conjugal relationship. He also testified that it was like being back in his marriage. *Id.,* 396. On cross-examination, the prosecution asked Figgures if he had been harassing his ex-wife over the past year, both of which he denied, and whether there had been several police reports made, which he admitted. The prosecution then submitted an ex-parte criminal injunction filed against Figgures on December 18, 1989. *Id.,* 397. Figgures argued on appeal that the reports were improper rebuttal evidence. *Id.,* 397-398. The Supreme Court disagreed, holding that while the general rule is that a denial cannot be elicited on cross-examination simply to facilitate the admission of new evidence, that was *not* what occurred:

> On direct examination, defendant specifically stated that he was in the process of reconciling with complainant. Consequently, whether he was reconciling with her or harassing her at this time was already part of the case *before* cross-examination. This line of questioning by the prosecutor did not inject a new issue into the case, instead, it served as the basis for a thorough and proper exploration regarding the veracity of defendant's prior testimony. *Id.,* 401.

This case presents a situation diametrically opposed to *Rice* and *Figgures.* In his direct testimony, defendant testified about his occupation at the time of the alleged incidents, the hours he worked, his relationship with Mulvina and Daejanae, "LeLe's" illnesses, the confrontation with Mulvina over Daejanae's allegations of sexual abuse, the circumstances leading to his trip to Florida, his actions on August 13, 2001, that he called police after learning that they were looking for him, that after he was arrested, he

tested negative for infections, that he did not give anyone permission to let Mulvina into the marital home to retrieve possessions and that his marital problems were the reason for the allegations (4-30-01 77-107, 118-131). He also denied committing the offenses. Defendant's denials that he was home alone with the children when Godfrey dropped Daejanae off after her visits and that she never spent two weeks with Godfrey came during *cross-examination.* Unlike *Rice* and *Figgures,* in this case, defendant's denials were not part of his case *before* cross-examination. What happened here was that the prosecution elicited different denials from defendant and rebutted those fresh denials with his testimony, contrary to *Leo.*

Godfrey's testimony was also improper rebuttal testimony because it concerned a collateral matter. Case law consistently prohibits using rebuttal testimony to impeach a witness on unrelated, collateral facts. *People v Charles O. Williams,* 159 Mich 518, 512 (1910); *People v Teague,* 411 Mich 562, 566 (1981). Rebuttal testimony is limited to relevant and material evidence bearing on an issue properly raised in this case. *People v Bennett,* 393 Mich 445, 449 (1975). Rebuttal evidence on collateral matters was prohibited in *People v McGillen #1,* 392 Mich 215 (1974):

> As a general rule, *a witness may not be contradicted as to collateral, irrelevant, or immaterial matters,* and, accordingly, subject to some qualifications, where a party brings out such matters on cross-examination of his adversary's witness, he may not contradict the witness' answers. This rule is followed in Michigan. *Driscoll v People,* 47 Mich 413; 11 NW 221 (1882); *Hamilton v People,* 46 Mich 186; 9 NW 247 (1881); *People v Hillhouse,* 80 Mich 580; 45 NW 484 (1890). *Id.*

Furthermore, the prosecution may not put on a rebuttal witness simply to contradict a witness on a collateral matter:

> On collateral matters, the testimony of a witness is binding except as it may be shaken by his own cross-examination, and even such cross-

> examination may be limited in the discretion of the trial judge to keep the trial within the bounds of relevancy and pertinency. Under no circumstances may testimony of others be produced to impeach by putting in issue the accuracy or truthfulness of the witness on unrelated matters. *People v Ellerhorst,* 12 Mich App 666, 760-761 (1968).

Evidence is prejudicial if it is likely to influence the jury on the basis of some factor other than its probative value. Here, Godfrey's rebuttal testimony had no probative value because whether or not defendant was alone with the other children when he brought Daejanae back from a visit had no tendency to establish the elements of the charged offenses. MRE 401.

Unpreserved, non-constitutional error is not to be viewed in terms of whether the defendant is guilty, instead, it is to be reviewed for plain error affecting substantial rights. *People v Mateo,* 453 Mich 203 (1996); *United States v Olano,* 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). For unpreserved, non-constitutional error, the defendant has the burden of establishing a miscarriage of justice under a "more probable than not" standard. *People v Luckity,* 460 Mich 484 (1999). Under this test, the trial court's error was not harmless. The prosecution argued in its closing argument that Godfrey gave honest testimony:

> ...the last witness you heard yesterday afternoon, Mr. Godfrey Norman, he's honest.
>
> He hates the guy. Well, I mean if your father was up there and you were in his shoes you'd probably say the same damn thing. Yeah, the guy thought, he come (sic) to tell you every time I took her home, I took her home like I was suppose (sic) to on Sunday night and I'd want to know who's in the house so she'd run in and come out and tell me (5-1-02 24-25).

Here, the prejudice to defendant's case is apparent, because it focused the jury's attention on something that had nothing to do with this case. Whether or not defendant was home alone with his other two daughters when Daejanae returned from spending

time with her biological father has nothing to do with whether defendant had an opportunity to molest her due to Mulvina's absence. Daejanae testified that she could not remember if anyone else was at home at the time of the alleged assaults.

Alternatively, defendant was denied effective assistance of counsel when his attorney did not object to Godfrey's testimony on this alternative ground. The constitutional right to effective counsel is inherent within the fundamental right to representation by counsel. US Const, Ams VI, XVI; Const 1963, art 1, §§17, 20; *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1983); *People v Degraffenreid,* 19 Mich App 702 (1969). It must be established that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant so as to deny him a fair trial. *Strickland, supra; People v Pickens,* 446 Mich 298, 338 (1994). A defense attorney is ineffective when his actions or omissions are not the result of "reasonable professional judgment" and when his performance is "deficient." *Strickland,* 687, 690, 692-693, 700.

The defendant must also demonstrate a "reasonable probability" that the result of the proceeding would have been different without counsel's errors. *Strickland,* 694. When defense counsel's actions are a matter of trial strategy, this Court will not find them to be constitutionally ineffective. *People v Tommolino,* 187 Mich App 14, 17 (1991). It that strategy is not sound, however, it may constitute reversible error. *People v Dalessandro,* 165 Mich App 569, 577-578 (1988). Even an otherwise competent attorney may make a "serious mistake" which denies the defendant due process of law. *Degraffenreid,* 715-716. If this court decides that it cannot review whether Godfrey's

testimony was the proper subject of rebuttal because it did not rebut anything presented in defendant's case-in-chief, then counsel was ineffective.

It is clear that if counsel made the proper objection to Godfrey's testimony, it would not have been admitted, because whether or not defendant was home alone with Daejanae's sisters when Daejanae returned from visits with her biological father was collateral, and not responsive to his direct testimony. Because the record is clear, and there is no possible trial strategy to justify counsel's failure to object to Godfrey's testimony as being improper rebuttal testimony, review is possible without an evidentiary hearing. *People v Ginther,* 390 Mich 436 (1973). Defendant is entitled to a new trial.

4. DEFENDANT-APPELLANT MUST BE RESENTENCED BECAUSE THE TRIAL COURT INCORRECTLY SCORED OV 13, AND THE RESULTING 15 TO 30-YEAR SENTENCES WERE IMPOSED ABOVE THE STATUTORY SENTENCING GUIDELINES WITHOUT ANY SUBSTANTIAL AND COMPELLING REASONS TO DO SO.

Standard of Review & Issue Preservation

Statutory interpretation and the proper application of the statutory guidelines are questions of law subject to *de novo* review. *People v Babcock,* 244 Mich App 64, 72 (2000); *People v Hegwood,* 465 Mich 432, 436 (2001); *People v Libbett,* 251 Mich App 353, 365 (2002).

Defendant did not object to the scoring of OV 13. The Court of Appeals used the plain error standard of *People v Carines,* 460 Mich 750, 763 (1999) (49c).

Discussion

At sentencing, the prosecution argued that OV 11 and OV 13 were incorrectly scored (ST 3). OV 11 was lowered from 50 points to 25 points (ST 3). OV 13 was raised from zero points to 50 points, over defense objection, because:

> ...in looking at the instructions for determining the appropriate points under this variable – I'm speaking of O.V. 13 – all crimes within a five year period, including a sentencing offense, shall be counted regardless of whether the offense resulted in a conviction (ST 4-5).

This ruling was plain error. The legislative sentencing guidelines apply to this case because the offenses were committed after January 1, 1999. MCL 769.34(1), (2); *Hegwood, supra,* 438. First degree criminal sexual conduct is included in the statutory sentencing guidelines as a crime against a person and a Class A offense. MCL 777.16y. The guidelines instruct that 50 points are scored where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age." MCL 777.43(1)(a). While the trial court was correct that "all crimes within a five-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction," that instruction is trumped by MCL 777.43(2)(c):

> Except for offenses related to membership in an organized criminal group, *do not score conduct scored in offense variable 11 or 12.*" MCL 777.43(2)(c) (emphasis added).

Here, under the plain language of the guidelines instructions, the trial court erred when it assessed 50 points under OV 13 because it had already scored the penetrations that arose out of the "sentencing offense" under OV 11. He should have been assessed zero points under OV 13.

Defendant acknowledges that OV 11 instructs that "multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense *may* be scored in offense variable 13,[19] but in order to justify the scoring of 50 points, the offense must have been "part of a pattern of felonious criminal activity involving *3 or more* sexual penetrations against a person or persons less than 13 years of age." MCL 777.43(1)(a) (emphasis added). The only evidence of "other" penetrations that were not taken into account for purposes of sentencing were the two alleged Florida penetrations. Because they do not constitute "three or more penetrations," the trial court was precluded from assessing any points.

Had the guidelines been scored correctly, defendant's minimum range would have dropped from C-V, 126 to 210 months to C-III, 81 to 135 months, and his resulting 180-month (15-year) sentence was a departure from the correct range imposed with no finding or articulation of substantial and compelling reasons for departure required by MCL 769.34(3). Without an articulated substantial and compelling reason for departure, resentencing is required, because the trial court imposed the sentence under a misapprehension of the applicable law, because it believed it was not departing. MCL 769.34(11); *Babcock, supra; People v Whalen,* 412 Mich 166 (1981).

Had the guidelines been correctly scored, resulting in a lower recommended range, the trial court may well have issued a lesser sentence, because it imposed close to the highest possible minimum sentence under the erroneous guidelines. If the trial court had imposed close to the highest possible minimum sentence under the correct guidelines, defendant would have received a minimum sentence somewhere in the neighborhood of 130 months, substantially less than the imposed 180-month minimum.

[19] MCL 777.41(2)(b).

PRAYER FOR RELIEF

Defendant-Appellant ANTHONY WESTCARR respectfully requests that this Honorable Court grant this application for leave to appeal or order other appropriate relief, such as peremptory reversal of his convictions and sentences.

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